THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA



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| IN RE:<br><br>Clifford Jerome Smith, Sr. and Shannon Bright Smith<br><br>Debtor(s). | **Case No. 98-3207-B**<br><br>**Chapter 13** |
| Shannon Bright Smith<br><br>Plaintiff(s)<br><br>v. | **Adv. Proc. No.: 99-80186-B** |
| United Student Aid Funds, Inc., USA Group, Inc. and R. Geoffrey Levy, Chapter 13 Trustee.<br><br>Defendant(s) | |

JUDGMENT ON ORDER DATED FEBRUARY 3, 2000:

It is hereby

ORDERED that the relief requested by the Plaintiff in her complaint is denied.

WM. THURMOND BISHOP
United States Bankruptcy Judge

Columbia, South Carolina
February 3, 2000

17

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| IN RE:<br><br>Clifford Jerome Smith, Sr. and Shannon Bright Smith<br><br>Debtor(s). | **Case No. 98-3207-B** |
| Shannon Bright Smith<br><br>Plaintiff(s)<br><br>v. | **Chapter 13**<br><br>**Adv. Proc. No.: 99-80186-B** |
| United Student Aid Funds, Inc., USA Group, Inc. and R. Geoffrey Levy, Chapter 13 Trustee.<br><br>Defendant(s) | **ORDER** |

This matter comes before the Court upon an adversary complaint, which was filed June 3, 1999, by the Plaintiff asserting that certain actions and conduct of United Student Aid Funds, Inc. and USA Group, Inc., (Defendants), violated 11 U.S.C. §§ 525(a), 525(c), 362(a) and 362(h)[1]. The Defendants filed their answer on August 10, 1999[2]. Present at the hearing were Elizabeth M. Atkins, attorney for the Plaintiff, and Lil Ann

[1]Further references to Title 11, U.S.C. shall be by section number only.

[2]The Chapter 13 Trustee did not file an answer or make an appearance in this action.

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16

Gray, attorney for the Defendants.

After receiving the evidence and argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.[3]

**FINDINGS OF FACT**

The Debtors' Chapter 13 case was filed on April 14, 1998. The Plaintiff is one of the debtors in the Chapter 13 case. R. Geoffrey Levy was the Chapter 13 Trustee in this matter at the time of filing. The pending adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). This Court has jurisdiction and venue over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. §§ 362 and 525.

The Defendants are creditors of the Plaintiff by virtue of their claim which represents one or more guaranteed student loans.

This Debtor filed her voluntary petition for relief under Chapter 13 of Title 11 of the United States Bankruptcy Code prior to the amendment of § 523(a)(8) which eliminated the seven (7)

[3]The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

year discharge exception. The subject student loan obligations which became due within seven (7) years of the filing of the Chapter 13 petition are excluded from discharge in this case pursuant to § 1328(a)(2).

The Plaintiff's student loans have been reported by one or both of the Defendants on her credit reports as being in default for nonpayment during the course of Plaintiff's Chapter 13 bankruptcy case.

The student loan obligation was in default for nonpayment at the time the Plaintiff's Chapter 13 case was filed. No order has been entered that determines the dischargeability of the Plaintiff's student loan obligations.

The Plaintiff has two (2) outstanding unpaid defaulted student loans with the Defendants. The first loan, a Stafford loan, was purchased by United Student Aid Funds, Inc. because of the Plaintiff's default in making payments on May 30, 1997, and had an original principal balance of $2,250.00. The second loan, a consolidation loan, was purchased by United Student Aid Funds, Inc. because of the Plaintiff's default in making payments on September 26, 1997, and had an original principal balance of $28,048.67.

On February 24, 1998, the Defendants forwarded an

administrative wage garnishment order to Plaintiff's employer. The effective date of the administrative wage garnishment order was the pay period ending March 24, 1998. The amount of the wage garnishment was approximately $105.00 per pay period. Payment was last remitted on behalf of the Plaintiff on her student loan obligations on or about April 20, 1998. At the time of the April 20, 1998 payment, the Plaintiff's loans remained in default status due to nonpayment because the payments received as a result of the administrative wage garnishment order were insufficient to cure said default. The garnishment stopped upon debtors' filing. No additional payments have been received by the Defendants since the Chapter 13 plan was confirmed on June 18, 1998.

USA Group, Inc. provides administrative services to United Student Aid Funds, Inc., which is an affiliated company of USA Group, Inc. United Student Aid Funds, Inc. is a nonprofit corporation whose principal business is guaranteeing educational loans made pursuant to the Federal Family Education Loan Program.

The Federal Family Education Loan Program was established by the Higher Education Act of 1965, (HEA), as amended, Pub. L. No. 89-329, November 8, 1965, title IV, 79 Stat. 1219; 20 U.S.C. §§ 1071 through 1087-4.

United Student Aid Funds, Inc. is a guaranty agency pursuant to the Federal Family Education Loan Program. The loans issued pursuant to this Program are reinsured by the United States Department of Education. The applicable statutes and regulations which control the collection activities and obligations on student loans defaulted because of nonpayment are 20 U.S.C. §§ 1078, 1078-1, 1078-2, 1078-3, 1080a, 1082, 1087, 1091a, and 1099, together with 34 C.F.R. § 682.410.

An individual's eligibility for additional student loans is controlled by 34 C.F.R § 668.35. The applicable statutes and regulations which control the collection activities and obligations on student loans in which the borrower has filed for bankruptcy protection are 20 U.S.C. § 1087 and 34 CAR § 682.402(f),(g),(h), and (l).

The Plaintiff contends that, but for the fact that her previous student loans continue to be reported as being in default for nonpayment, she would be eligible to receive certain grants and entitlement to further her education. It not disputed that the Defendants continue to report the Plaintiff's student loans as being in default for nonpayment and this information is included on the Plaintiff's credit report(s).

Pursuant to its contractual obligations as a guarantor of

educational loans under the Federal Family Education Loan Program, United Student Aid Funds, Inc. strictly adheres to the provisions of the Higher Education Act of 1965, as amended, and the applicable Federal statutes and regulations.

A student who is in default for nonpayment on a loan made under a title IV, HEA loan program may nevertheless be eligible to receive title IV, HEA program assistance if the student (1) repays the loan in full; or (2) (I) makes arrangements, that are satisfactory to the holder of the loan and in accordance with the individual title IV, HEA loan program regulations, to repay the loan balance; and (2) (ii) makes at least six [6] consecutive monthly payments under those arrangements.[4] The Plaintiff did not enter into any type of repayment arrangement prior to her filing for bankruptcy.

The Plaintiff's confirmed Chapter 13 plan proposes to repay only ten percent (10%) of the outstanding loan balance as an allowed claim. The plan's provisions do not repay the entire outstanding loan balance. The repayment proposed through the Plaintiff's confirmed Chapter 13 plan does not meet the requirements of 34 CAR § 668.35(a). As a result, the Plaintiff

[4] 34 C.F.R. § 668.35(a)

is not eligible to receive title IV, HE program assistance.

A student who otherwise is in default on a loan made under a title IV, HE loan program is not considered to be in default if the student (1) obtains a judicial determination that the debt has been discharged or is dischargeable in bankruptcy; or (2) demonstrates to the satisfaction of the holder of the debt that (I) when the student filed the petition for bankruptcy relief, the loan had been outstanding for the period required under § 523(a)(8)(A)[5], exclusive of applicable suspensions of the repayment period for either debt of the kind defined in 34 CAR § 682.402(m); and (ii) the debt otherwise qualifies for discharge under applicable bankruptcy law.[6]

It is undisputed that the Plaintiff does not meet the criteria outlined in 34 C.F.R. § 668.35(f) as it pertains to the dischargeability of the Plaintiff's student loan indebtedness.

When a student loan is defaulted for nonpayment, a guaranty agency, such as the Defendants, is required to report promptly, and on a regular basis, to all national credit bureaus the following information:

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[5]Debtor filed her voluntary petition for relief under Chapter 13 of Title 11 of the United States Bankruptcy Code on April 14, 1998, prior to the amendment of 11 U.S.C. § 523(a)(8) which eliminated the seven (7) year discharge exception.

[6]34 CAR § 668.35(f); 20 U.S.C. § 1091; 11 U.S.C. §§ 523 and 525.

(A) The total amount of loans made to the borrower and the remaining balance of those loans;

(B) The date of default;

(C) Information concerning collection of the loan, including the repayment status of the loan;

(D) Any changes or corrections in the information reported by the agency that resulted from information received after the initial report; and

(E) The date the loan is fully repaid by or on behalf of the borrower or discharged by reason of the borrower's death, bankruptcy, or total and permanent disability.[7]

Plaintiff has asserted that the conduct of the Defendants by continuing to report Plaintiff's student loans as defaulted for nonpayment violates § 525 (c)[8] and § 362 (a) and (h). While the Defendants are reporting to National Credit Bureaus and

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[7]20 U.S.C. § 1080a; 34 CAR § 682.410(b)(5)(I).

[8]11 U.S.C. § 525 © states, in part:

(1) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or a bankruptcy or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of a case under this title or during the pendency of the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(2) In this section, "student loan program" means the program operated under part B, D, or E of title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.

organizations that the Plaintiff's student loans are in default for nonpayment, they are not reporting that the default in loan obligations was a result of the Plaintiff's bankruptcy filing. Plaintiff contends, and argued so at the hearing, that requiring her to meet all of the steps to obtain new assistance also violates § 525. At trial this Court denied the relief sought pursuant to § 525, holding that the conduct of the Defendants was not discriminatory. This ruling justifies further amplification.

**CONCLUSIONS OF LAW**

A student who has defaulted in a prior loan can get new government assistance in spite of this fact provided the default is removed. The method of removing the default under the Bankruptcy Code differs from that of the federal regulation. Under the regulation, it can be removed in several ways, namely by making arrangements satisfactory to the holder to repay the loan and then making six consecutive monthly payments under those arrangements. Under the Code, defaults are handled through the Chapter 13 plan and come from the Debtor's disposable income. Here, removal of the default through the plan conflicts with the regulation and can't be implemented under the Code and the

regulation can't be implemented through the Code as the plan would pay one unsecured creditor, (the Defendants) more than it pays others.

The Plaintiff claims that outside bankruptcy she would have no impediment (other that ability to pay) in satisfying the requirements of the regulation but in bankruptcy, namely in a Chapter 13, she can't meet the requirements because of the Code. She is prohibited from making the required payments through the plan or outside of the plan. Since she can't do in her bankruptcy what she could do outside bankruptcy (cure the default), this, according to Plaintiff, results because of bankruptcy and discriminates against her, all in violation of § 525 (c).

While it is true that two bodies of federal law appear to conflict, the Code does not prevail to trump the regulation through § 525 © based on discrimination. This is a dispute which this Court appears to lack jurisdiction to resolve.

Section 525, as the title indicates, is to protect a Debtor against discriminatory treatment. It is designed to prevent discrimination against an otherwise qualified applicant because of his or her bankruptcy, past or present. In § 525 (c)(1), "because" means status of borrower and not the effect of

a Chapter 13 bankruptcy. It is because an individual is or was bankrupt or a debtor in bankruptcy and not bankruptcy in a general sense that § 525 addresses.

Defendants, pursuant to the federal regulation, actually are treating all applicants alike whether in or outside of bankruptcy. They are not applying a different standard or requirement to the Plaintiff because she is in bankruptcy. If so, this would be that type of discrimination the Code seeks to address under § 525 (c).

The remaining issue to be decided by this Court is whether the actions of the Defendants in reporting such information to the various credit reporting agencies is a violation of § 362 (a) and (h). Plaintiff contends that publication of information about her to credit organizations, namely that she is in default regarding her student loans, results in an adverse credit report and violates the automatic stay under § 362(a)(3), § 362(a)(6) and entitles her to relief under § 362(h). Federal law[9] requires Defendants to enter into agreements with credit bureaus and

[9] 20 U.S.A. 1080(a)

organizations to exchange or provide the various information set forth in this statute.

An argument, possibly, can be made that this information constitutes an act to collect and violates the stay since the above requirements are for the purpose of promoting the repayment of student loans. This Court, however, believes that a stronger argument can be made, and so finds, that any collection aspects are so indirect and insignificant that they are harmless and inconsequential as far as they impact Plaintiff's bankruptcy and no stay violation results from them.

This agreement between defendants and credit organizations is to share information which ultimately could be helpful in the collection process but it in no way constitutes or results in pressure on the Plaintiff to pay. An act to promote payment is not the same as an act to extract payment. Here the Defendants stopped collection activities against the Plaintiff upon her filing bankruptcy when they voluntarily ceased garnishment of her wages.

Plaintiff cites Malloy v. Phillips 197 B.R. 721(M.D. GA. 1996) for the proposition that complying with federal law can nevertheless be a violation of the automatic stay. In that case the Defendant, dealing directly with Plaintiff, was pursuing all

the required steps under the Fair Debt Collection Practices Act to collect and the specific action in question constituted a step or segment in this statutorily created collection process. This Court is in agreement with the decision in that case. Here, however, the acts of the defendants are so innocuous from a debt collection standpoint that the information they were required to furnish does not violate the stay.

The Defendants act of publication and the information revealed are accurate and factually correct regarding the Debtor's pre-petition and post-petition status which is that she has defaulted in the payment of her student loans and while this may have an adverse effect, bankruptcy in this case and under these circumstances will not remove it either on the basis of § 362 (stay violation) or § 522 (discrimination).

It appears to this Court that Plaintiff really is not complaining so much that Defendants are placing pressure on her to pay or are even attempting to collect their loans, or for that matter are committing any act for which the automatic stay traditionally is designed to prevent, but rather the crux of her complaint is that Defendant's activity is wrong because it results in her inability to get new grants or assistance and her bankruptcy status should eliminate any information which is

adverse to her. This Court disagrees.

Since this information does not violate the stay under any section of 362, § 362(h) is not applicable.

For the foregoing reasons, it is hereby

ORDERED that the relief requested by the Plaintiff in her complaint is denied.

WM. THURMOND BISHOP
United States Bankruptcy Judge

Columbia, South Carolina
February 3, 2000